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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of CHARLENE and DAVID HARRIS.	
CHARLENE FUNK, Appellant, v. DAVID HARRIS, Respondent.	G047229 (Super. Ct. No. 05D011004) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James L. Waltz, Judge. Motion to dismiss appeal. Motion for judicial notice. Motions denied. Order affirmed.

Family Violence Appellate Project, Erin C. Smith, Nancy K.D. Lemon; Bingham McCutchen, Bree Hann, Nargues Motamed and Sarah Barker-Ball for Appellant.

Dabney Finch for Respondent.

Charlene Funk (formerly Charlene Harris) appeals from an order modifying child visitation, which follows the judgment dissolving her marriage to David Harris. The order contains several provisions which, taken together, are intended to facilitate what the court refers to as "reunification" between Harris and the couple's daughter, T. Funk argues the order must be reversed because: (1) it improperly grants temporary legal custody of T. to her counsel; (2) it effectively overrules the factual finding at the heart of the parties' original custody order issued in 2008, which awarded sole legal and physical custody to Funk on the basis that "[t]he preponderance of the evidence points to the father as the perpetrator of sexual abuse on [the child]"; (3) it reflects a failure to consider Harris's earlier physical abuse of Funk; (4) it improperly orders "reunification services" in a child custody proceeding, in violation of Family Code section 3026; and (5) it improperly delegates discretion to determine Harris's visitation and schedule to a court-ordered "reunification counselor and child's therapist." Funk also requests that we order the case assigned to a new judge on remand.

For his part, Harris has moved for dismissal of the appeal, arguing first that Funk's refusal to follow the court's order warrants dismissal under the appellate disentitlement doctrine, and second that her subsequent execution of a stipulation agreeing to abide by the order moots the appeal. Harris acknowledges these arguments may appear "contradictory," and we conclude they are. The disentitlement doctrine is not designed to punish a party, but to vindicate the court's interest in inducing compliance with presumptively valid orders. (*In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 459.) Here, according to Harris's own description, the trial court achieved that compliance in the course of subsequent proceedings which culminated in Funk's stipulation. Even Harris admits there is no evidence Funk requires further inducement (he states "it is unknown whether she is still disobeying," and merely asserts it is "likely" she would be *if the trial court had not taken action*). Moreover, we find no basis to conclude Funk's stipulation was intended to reflect anything more than her explicit

agreement to comply with the disputed order pending appeal. Consequently, both the motion to dismiss and its attendant request for judicial notice are denied.

At oral argument, Harris also claimed the appeal had become moot. We invited the parties to address that issue in supplemental briefing and having considered those supplemental briefs, we conclude the appeal is not moot. While the factual circumstances in this case have continued to evolve, it is clear the parties' core dispute is unresolved, and thus the issues raised herein remain relevant.

On the merits, we affirm the order. We reject Funk's challenge to the award of temporary legal custody to T.'s counsel because that award was actually made in an earlier order, was not appealed, and thus cannot be challenged in this appeal. The same analysis applies to Funk's contention the court improperly delegated discretion to its court-appointed therapeutic expert. Both of those rulings were initially made in October 2011, in an appealable order that had long since become final by the time the court issued the order challenged herein.

Moreover, we find no error in the court's analysis of T.'s best interests in connection with the challenged order. Because the order reflected only a change in *visitation*, rather than *custody*, the court was not bound by the changed circumstances rule. Thus, the court properly based its assessment of T.'s best interests on its own evaluation of the current circumstances, and in the absence of an affirmative contrary showing, we presume the court considered all relevant circumstances in making that assessment. Nor did the court improperly order "reunification" services here. While we agree the court did characterize its order as a "reunification" order, and even utilized the term "reunification services" within it, those labels do not control our assessment of the order's substance. In substance, the order does nothing more than modify visitation and impose a requirement that father and daughter both engage in therapy with the court-ordered professional who would also supervise the visitation process. Such an order is expressly authorized by the Family Code. Finally, having found no merit in Funk's

assertions of error, we likewise reject her request that we assign this case to a different judge on remand.

FACTS

Funk and Harris were previously married, and their daughter T. was born in 2002. In 2007, while the parties' marital dissolution action was pending, evidence came to light that Harris might have sexually abused T. The claim was disputed by Harris, and during the period of February to June of 2008 the court conducted a full evidentiary hearing to resolve the parties' competing claims to child custody.

Following that hearing, which centered almost entirely on the sexual abuse issue and included the testimony of multiple experts, the court issued its ruling. Initially, the court noted "[t]his is the kind of case the family law judge loses sleep over. Mother wants sole legal and physical custody, with no visitation for father because she claims father repeatedly sexually abused the couple's young daughter. Father denies the allegations. The District Attorney has, to date, declined to prosecute." The court then summarized the evidence adduced at the hearing, and specifically noted it found Funk "to be a credible witness." Ultimately, the court made an explicit finding that "the preponderance of the evidence points to the father as the perpetrator of sexual abuse on [the child.]" and based on that finding, held "that sole legal and physical custody shall be awarded to [Funk], with no visitation to Dr. Harris until such time as it is established that even monitored visitation would be in the child's best interest."

Shortly thereafter, the case was taken over by a different judge. In September 2008, the court issued a restraining order against Harris, as well as a final judgment on reserved issues which awarded sole legal and physical custody of T. to Funk, and denied visitation to Harris. Rather than appealing that judgment, Harris moved for an order modifying it in December of 2008. Specifically, Harris sought a

modification which would allow him to resume contact with T., beginning with monitored visitation. In his motion, Harris acknowledged the court had made a finding he sexually abused T., which he continued to "absolutely deny," but argued he should be afforded "reunification leading up to full visitation," and offered to participate in therapy. Thus began a long and bumpy process which ultimately culminated in the challenged order of June 4, 2012.

One significant bump is reflected in the court's issuance of an order in October 2011, granting "temporary sole legal custody" of T. to her counsel, Sheryl Edgar. That order also included a provision ordering court-appointed therapist, Mitchell Rosen, to "develop and implement a reunification plan between [Harris] and [T.] according to his discretion." The order was based on the court's determination that T. was "'at immediate risk' under the legal control of her mother . . . ."

The challenged order, which is characterized as a "Reunification Order," was issued nearly eight months later. It first specified that attorney Edgar would continue to serve in the capacity of "minor's counsel" at Harris's expense. It next specified that "[w]hile extraordinary, . . . minor's counsel shall continue and remain vested with *temporary sole legal custody of [T.]*, and retain sole decision-making authority affecting [T.]'s health and educational needs." (Italics added.) It then stated T. would henceforth be attending public school, and would not be home schooled pending further order of the court.

The order then addressed "Reunification Counseling and Father's Parenting Time," by first providing that previously ordered "reunification counseling and reunification services" would continue, and that "[t]herapist Mitch Rosen shall continue-on as the reunification counselor and child's therapist." The order then provided that "[t]herapist Mitch Rosen shall conduct regular conjoint counseling between father and [T.], and schedule and oversee father-child parenting time. [¶] 1. The pace and schedule of individual therapy sessions, conjoint therapy sessions, and parenting time shall occur

at a pace and on a schedule and under circumstances established by Mitch Rosen, without any interference by the mother." Harris's parenting time was to be "monitored," with "the monitor selected by . . . Rosen." The order also gave Rosen authority to "construct parent-child launchings and ramp-up to day-time parenting-time between the father and [T.], and any increased parenting time shall occur according to Mr. Rosen's assessment of reunification progress and [T.]'s best interest." Harris was to bear all fees, costs and expenses of this effort.

The court then included in the order an eight-page explanation of the reasoning underlying those orders, which included a detailed history of the court's involvement with the custody and sexual abuse issue. The court noted Funk had, from the beginning of the dissolution proceeding, "engaged in a sustained effort to thwart and impede the father's parenting time and . . . interfered with his parent-child relationship." It cited a custody evaluation prepared back in 2006, in which the evaluator had acknowledged, but found unsubstantiated, Funk's prior claims that Harris had sexually abused T. The court noted that despite the inconclusive resolution of the issue in that child custody evaluation, Funk continued to press the claim of sexual abuse, and ultimately filed for a restraining order, which led to the appointment of the single expert – a Dr. Reinhart – who concluded the sexual abuse had occurred. Based on that sole opinion, Funk filed a motion in the dissolution action for a restraining order and requested that sole custody of T. be awarded to her with a no-contact order. That custody issue was assigned to Judge Mary Fingal Schulte, who concluded, after an evidentiary hearing, that "the preponderance of the evidence points to [Harris] as the perpetrator of sexual abuse on [T.]."

Following Judge Schulte's decision, the dissolution case was reassigned to Judge James Waltz, and he granted Funk the requested restraining order, specifying "no contact" between Harris and T. and ordering Harris to undergo treatment. Thereafter, Harris began seeking reunification with T.

After Harris filed his request to modify the no visitation order, the court appointed a new expert, Amy Stark, to evaluate the case on behalf of the court, and she later opined that reunification with Harris would be in T.'s best interest and suggested a therapist, Dr. Phyllis Daniels, to serve as T.'s individual therapist. The court appointed Daniels to serve in that capacity and later began what it characterized as a "supervised reunification process," with Stark serving "as the court's case manager." In the court's view, Funk did "all she could to thwart the counseling" and "appeared to exaggerate [T.]'s anxiety" as well as "incited and exacerbated the drama surrounding therapy and conjoint sessions with [Harris.]" The court noted that "[a]long the way, the court appointed minor's counsel, attorney Sheryl Edgar," who also "agreed that reunification [with Harris] served [T.]'s best interests."

Funk, however, "remained defiant and acted in opposition to any reunification." Her conduct was "so severe," and the "home environment so toxic to reunification, that minor's attorney . . . Edgar urged the court for extraordinary relief: a change of custody, in favor of third party placement and legal custody to attorney Edgar." The court observed that, among other things, Edgar had pointed out that neither she nor any of T.'s health care providers had ever seen T. "engage in the range or degree of symptoms professed by [Funk]," and Edgar "urged the court to find that [Funk] was driving the drama and inciting [T.] to act out and 'perform' for the reunification counselor."

After the court ordered T.'s legal custody vested in Edgar, however, Funk's behavior "grew worse." In the court's view, Funk "maintained a sustained campaign to scuttle reunification between [T.] and [Harris]," which ultimately "soil[ed] the relationship between the child and Dr. Daniels/Dr. Stark, particular[ly] after both therapists attempted to hold [Funk] accountable for . . . [T.]'s staged drama and calculated out-of-control behavior."

Funk moved to Riverside and requested for a change of venue to that county on the basis that all parties were then living there. The court denied that motion. Instead, the court appointed Rosen, who was also located in Riverside County, to act as the new "reunification therapist" in the case. After conducting what the court characterized as a comprehensive review of the case, Rosen opined that "reunification" with Harris was in T.'s best interests.

Following that recitation of the relevant history, the court's order summarizes that "[i]n the end, reunification was launched after a careful assessment of [T.]'s best interests, in consultation with court experts." The order then directly addressed Judge Schulte's earlier finding of past sexual abuse by Harris, acknowledging "[t]he court has a weighty responsibility to protect this child, particularly given the July 2008 finding entered by Judge Mary Schulte. This judge understands the serious and pernicious effects on the child under any reunification process (ordered by the court) that may re-victimize a child or enable an abuser to re-offend or place a child in the home of an abusive parent." The order explained that "while the [court] does not have the authority to retry this case or set aside the underlying finding of abuse, [it] does have the authority to give the underlying abuse finding the weight it deserves when assessing the best interests of the child."

The order then reiterated the determination that it is Funk who is primarily responsible for the complications in this case, noting "the court has drawn a strong inference [Funk] either manufactures the symptoms, or incites the child to act-out and the child displays conduct when necessary to justify [Funk's] opposition to the court supervised reunification program." The court concluded "[u]nder the very unique and very troubling circumstances at hand, the court is determined to press forward with reunification – not doing so will affirmatively harm [T.]."

It is from this order that Funk appeals.

DISCUSSION

1. Standard of Review

The challenged order, while lengthy and complicated, is limited to addressing custody and visitation rights. Trial courts have broad discretion to make such orders and our review is constrained by well-settled law. "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) "Generally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child." (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 299.) Significantly, "[w]e are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burges, supra,* 13 Cal.4th at p. 32.)

Moreover, "[i]n reviewing any order or judgment we start with the presumption that the judgment or order is correct, and if the record is silent we indulge all reasonable inferences in support of the judgment or order. [Citation.] Nonetheless, '"all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." [Citations.] Therefore, a discretionary decision may be reversed if improper criteria were applied or incorrect legal assumptions were made. [Citation.] Alternatively stated, if a trial court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, it cannot be said the court has properly exercised its discretion under the law. . . . The appellant bears the burden of showing a trial court abused its discretion.'" (*Chalmers v. Hirschkop, supra,* 213 Cal.App.4th at p. 299.)

2. Provisions Conferring "Temporary" Legal Custody of T. on Her Counsel and Delegating Discretion to Court-Appointed Therapist

We first address Funk's contention the court erred by awarding "temporary" legal custody of T. to her counsel, Edgar. An award of "legal custody" gives the custodian "the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, §§ 3003, 3006.)

Harris argues Funk cannot challenge this order on appeal because it is merely "temporary"; in the alternative, he argues that even if the order were appealable, Funk waived her right to appeal because the order was initially made in October 2011, and the time to appeal that order had long since passed. We agree with the latter contention.

Despite the court's use of the word "temporary" in its order granting legal custody to Edgar, that order did not legally qualify as a *temporary* custody order. In general, "temporary" custody orders are those intended to remain in effect only during the pendency of a marital dissolution proceeding, and then be superseded by the *final* custody award incorporated into the judgment of dissolution. (Fam. Code, §§ 3060, 3061; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559 ["A temporary custody order is interlocutory by definition, since it is made pendente lite with the intent that it will be superseded by an award of custody after trial"].)

In this case, the court's order awarding legal custody of T. to Edgar, however labeled, simply amounted to a modification of the earlier final custody order which had granted sole legal and physical custody of T. to Funk. As such, it was directly appealable when issued in October 2011, as an order entered after final judgment. (Code Civ. Pro., § 904.1, subd. (a)(2).) The general rule is that a party's failure to timely appeal from a judgment or appealable order precludes any later attempt to challenge its merit. And while that rule does not apply in cases where the challenged judgment or order exceeded the court's *fundamental* jurisdiction (*People v. Williams* (1999) 77 Cal.App.4th

436, 447), this is not such a case. A court's fundamental jurisdiction refers to its "jurisdiction over the subject matter and the parties in the fundamental sense . . . ." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Here, it is beyond dispute that the court had jurisdiction over both the subject matter of the case – child custody – and the parties. Moreover, Family Code section 3040 explicitly authorizes the court in a marital dissolution action to award custody of children to persons other than the parents. (Fam. Code, § 3040, subd. (a)(3).)

Because Funk failed to appeal from the court's *initial* order awarding legal custody of T. to Edgar, she has waived her right to challenge the propriety of that decision. The court's mere refusal to reverse the award in the order she did challenge, changes nothing.

The same analysis applies to Funk's contention the court erred by improperly delegating its discretion to determine a visitation schedule to therapist Rosen. In its October 2011 order, the court had already mandated that Rosen "shall develop *and implement* a reunification plan between [Harris] and [T.] according to his discretion." (Italics added.) In the current order, issued nearly eight months later, the court explicitly states it is merely "continu[ing]" that prior authority. If Funk believed the court had no authority to delegate such discretion to its court-appointed therapeutic expert, she should have challenged the original appealable order on that basis. Her failure to do that precludes such a challenge now.

In any event, we would not conclude that a court's mere delegation of the details of visitation, as opposed to the right to visitation, is improper. "The court has the sole power to determine whether visitation will occur. [Citations.] Once visitation is ordered, the court may delegate responsibility for managing details such as the time, place and manner of visits, none of which affect a parent's defined right to see his or her child." (*In re E.T.* (2013) 217 Cal.App.4th 426, 439.) Because Rosen was appointed by

the court, and is acting as the court's appointed expert, we find no abuse in its decision to delegate the details of Harris's visitation to Rosen.

3. Court's Alleged Abuse of Discretion

Funk also argues the court's order reflects an abuse of its discretion because it reflects a "fail[ure] to properly evaluate [T.'s] best interest." Specifically, Funk claims the court erred by "[e]ffectively overruling a prior judicial finding that [Harris] had sexually abused [T.]" and by "[f]ailing to consider the history of physical abuse by [Harris] toward [Funk]." We find neither claim persuasive.

With respect to the first point, Funk relies on the doctrine of res judicata to support her assertion that the court could not "overrul[e]" the earlier sexual abuse finding, which she emphasizes "was not appealed from and cannot be re-litigated post-hoc." Although we certainly agree with that legal principle – indeed, it is the very one we have relied upon above – we nonetheless reject Funk's attempt to apply it here. The problem with this argument is that it ignores the fact that the challenged order in this case modifies *visitation only*, not custody.

In the context of child custody and visitation orders, the doctrine of res judicata is embodied in the "changed-circumstance" rule first announced in *Burchard v. Garay* (1986) 42 Cal.3d 531, 535. As explained in *Burchard,* the rule requires courts to "preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements." (*Ibid*.) Thus, a final order adjudicating child custody is treated as binding, and it may be modified in subsequent proceedings only upon a showing that "there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 37.)

However, in light of the inherently dynamic nature of children and their needs, when the issue is limited to a modification of *visitation*, rather than a formal change in custody, "the changed circumstance rule does not apply," and the court retains "residual and broad discretion to modify visitation orders for legal parents to '"obviate time-consuming custody litigation . . . ."'" (*Chalmers v. Hirschkop*, *supra*, 213 Cal.App.4th at p. 305.)

Hence, because the challenged order in this case merely modified visitation, the court was not bound by the earlier custody order in the same way it might have been if it had actually modified custody. Consequently, the judge's apparent struggle to both honor the determination of sexual abuse made by the prior judge in 2008, while at the same time act on his own belief that it is Funk's continuing obsession with the abuse issue that is the more likely source of harm to T. going forward, was largely unnecessary. The court was required to base its current visitation order on what *it presently believed to be in T.'s best interest* – an analysis which properly *included* some consideration of the prior abuse finding, but was not controlled by it. We find no error.

And we are obligated to summarily reject Funk's assertion the court failed to consider the history of physical abuse perpetrated by Harris upon her. The mere fact the court's order does not affirmatively address that specific issue in no way establishes the court failed to consider it. Because we are obligated to indulge all inferences in favor of the correctness of the court's order, we must presume in the absence of some affirmative showing that the court *did* consider all relevant factors in reaching its decision. Funk has made no such showing.

Finally, Funk claims the court also abused its discretion by "[c]reating a conflict of interest" when it designated Rosen both the "reunification counselor *and* [T.'s] therapist." (Bold omitted.) Again, we disagree. The flaw in Funk's claim is found in her characterization of Rosen's charge: she claims he cannot both "promote reunification and neutrally provide therapy and counseling to [T.] . . . ." But nothing in the court's

order obligates Rosen to "promote" any specific outcome. He is designated to act as a *counselor*, not a promoter, and the court explicitly directs that he will carry out his duties "according to [his] assessment of reunification process and [T.]'s best interest." If anything, his concurrent role as T.'s therapist puts him in the best position to ensure that any progress toward normalizing her relationship with Harris will be to her benefit.

4. Improper Order of Family Reunification Services

Lastly, Funk also challenges the court's current order on the basis it violates the statutory prohibition against ordering family reunification services in a custody dispute. Although her argument has significant surface appeal, it is ultimately unpersuasive.

Family Code section 3026 states in pertinent part: "Family reunification services shall not be ordered as a part of a child custody or visitation rights proceeding . . . ." Unfortunately, the statute does not define the scope of prohibited "[f]amily reunification services," and to complicate things further, the court here did characterized activities specified in its order as "reunification services."

But our concern is with the order's *substance*, not its characterization. And in substance, this order merely couples the visitation order with a requirement that both Harris and T. participate in therapy with Rosen, at Harris's expense. Such a requirement could not be construed as prohibited "reunification services" because it is expressly *authorized* by statute in a marital dissolution case. Family Code section 3190 provides: "The court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than one year, provided that the program selected has counseling available for the designated period of time, if the court finds both of the

following: [¶] (1) The dispute . . . poses a substantial danger to the best interest of the child. [¶] (2) The counseling is in the best interest of the child." (Fam. Code, § 3190, subd. (a).) This case certainly meets those requirements.

DISPOSITION

The motions to dismiss and for judicial notice are denied. The order is affirmed. Harris is to bear his own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.